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C O N F I D E N T I A L SECTION 01 OF 02 BERLIN 002829

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TREASURY FOR JFREIS AND MJACOBSON

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TAGS: PTER KJUS ETTC EFIN KTFN PGOV GM EU

SUBJECT: TREASURY OFFICIALS underscore BASIS, VALUE OF TFTP
("SWIFT" PROGRAM)

Classified By: Minister-Counselor for Economic Affairs Robert F. Cekuta
for Reasons 1.4 (b) and (d)

¶1. (C) Summary. Treasury Department Deputy Assistant General Counsel James Freis and Senior Advisor Michael Jacobson underlined the legal basis and the value of the Terrorist Finance Tracking Program (TFTP) in several meetings with German officials September 19. German officials, who are preparing to answer Bundestag inquiries, said German interest focused on the program's legality and who in Germany had been informed. The expert-level officials appeared convinced of the TFTP's legality under U.S. law, but nevertheless expressed concern about legality and perceptions under EU civil legal standards. End Summary.

U.S. PRESENTATION

¶2. (SBU) Freis walked German officials through the legal underpinnings, drawing from the 1977 International Emergency Economic Powers Act, the relevant UN Security Council Resolutions, the President's emergency declaration after 9/11, Executive Order 13224, and OFAC implementing regulations. On safeguards, Freis stressed the audits by Booz Hamilton and SWIFT oversight of data inquiries. Asked about the program's value and successes, Freis and Jacobson referred to an arrest of a Jemaah Islamiyah leader complicit in the Bali nightclub bombing.

GERMAN CONCERNS: LEGALITY, WHO KNEW WHAT

¶3. (C) German officials agreed the TFTP had raised some doubts and questions in German public debate, but they had been modest and manageable compared to German media and Bundestag interest in other issues -- they cited the Kurnaz release from Guantanamo and alleged renditions. Justice Ministry Deputy Office Director for Securities, Bank and Stock Exchange Law Carola Schwersmann listed what she sees as the areas of greatest concern to Bundestag members regarding TFTP: what are the facts concerning what TFTP is and what it is not; who in the German Government knew what about TFTP, when, and why; and is TFTP legal. She cautioned that legality under U.S. would not be sufficient for some Bundestag members and cited Guantanamo as an example of an activity legal under U.S. law but not acceptable to some Bundestag members. Social Democratic Party (SPD) Bundestag Interior Affairs Committee Senior Staff Member Sven Berger said German questions would focus on legality and authorization.

¶4. (C) Schwersmann showed Freis and Jacobson a list of 25 questions posed by Bundestag members from the opposition Greens Party and explained she is advising the Finance Ministry on the German Government's response. Relatively few of the questions concerned the TFTP itself; most concerned German government knowledge of it. Berger said he was unaware of SPD members expressing any concerns about the TFTP, but Schwersmann said she expected the opposition FDP (Free Democrats) to raise doubts similar to the Greens'. Berger asked why SWIFT had kept information about financial transactions at its U.S. facility that did not involve U.S. banks or addresses -- e.g., transfers between two European banks.

¶5. (C) Finance Ministry Office Director for Terrorism Finance, Money Laundering and Financial Crimes Michael Findeisen feared it would be very difficult to convince Bundestag members and other European parliamentarians that SWIFT's cooperation with the U.S. at the same time complies with stringent European data-protection laws and regulations.

Findeisen and his colleague Christian Mayer, who will be part of the German Government team to answer Bundestag questions at a September 27 hearing, also raised the issues of sovereignty and jurisdiction, noting that SWIFT, as a Belgian firm, was explicitly subject to Belgian and EU data-protection laws, so there appeared to be a conflicts of law problem. SWIFT and its participating financial institutions would likely still have considerable explaining to do on the coming weeks and months, Findeisen said.

TFTP "PROTECTS PRIVACY"; OTHER FAVORABLE COMMENTS

¶6. (C) In response to concerns raised about protection for
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personal data in the United States, Freis stressed that although U.S. laws might be different, there was a combination of U.S. restrictions on use of data and safeguards that together create some equivalency with what exists in the EU to protect data. Moreover, he stressed that under the EU Privacy Directive itself, there are exceptions for the sharing of national security information, including with respect to combating terrorist financing. Findeisen said that the U.S. team's presentation had convinced him that TFTP is narrowly focused, has safeguards in place, and has a sufficient legal basis under U.S. law. At the end of the meeting, Schwersmann noted that the more she learned about the TFTP, the more she believed that Germany "would have done the same thing." Berger commented that the U.S. might argue that the TFTP actually respects individuals' privacy more than other law enforcement programs to obtain financial data.

German agencies with proper authorization approach banks where a suspect has an account, inform bank staff of their suspicion, and demand information about the suspect's accounts, Berger explained. Experience had shown that even if a suspect is eventually exonerated or acquitted, his reputation at his bank is ruined and banks have denied loans and other services simply on the basis of the initial police inquiries. In contrast, Berger concluded, TFTP did not inform banks of government suspicions.

¶7. (U) This message was cleared by the Treasury delegation subsequent to their departure from Berlin.
TIMKEN JR